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SUPREME COURT, U.S.

NO. 80-6725

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

ANDREW PHILLIP LEGARE,

Petitioner,

v.

WALTER D. ZANT, SUPERINTENDENT,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether Petitioner's contention that his sentence of death constitutes cruel and unusual punishment under the Eighth Amendment solely because Petitioner was seventeen years old at the time of the offense presents anything for review by this Court?

2.

Whether, contrary to Petitioner's contentions, Petitioner's jury was instructed to disregard Petitioner's youth as a possible mitigating factor?

3.

Whether, contrary to Petitioner's contentions, defense counsel's tactical decision not to present witnesses on the sentencing phase of trial rendered counsel ineffective?

4.

Whether, contrary to Petitioner's contentions Ga. Code Ann. § 27-2534.1(b)(7) is unconstitutional as applied to the facts of this instant case?

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

(i)

On November 23, 1977, Petitioner was convicted of armed robbery, burglary, and murder in the Superior Court of Baldwin County, Georgia. Sentences of life imprisonment, twenty years imprisonment, and death were respectively imposed. Petitioner's convictions and sentences were affirmed on direct appeal at Legare v. State, 243 Ga. 744, 257 S.E.2d 247, cert. den., 444 U.S. 984 (1979). [Respondent's Appendix A].

From the denial of relief on direct appeal Petitioner next filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. On June 10, 1980, Petitioner was afforded an evidentiary hearing upon the aforementioned petition. Thereafter, on October 13, 1980, the state habeas court rendered its order denying Petitioner habeas relief. [Respondent's Appendix B].

From the denial of habeas relief Petitioner sought a certificate of probable cause to appeal to the Supreme Court of Georgia. On February 24, 1981, the Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal the adverse decision of the state habeas court.

From the Supreme Court of Georgia's February 24, 1981 order denying Petitioner's application for a certificate of probable cause to appeal, this petition for a writ of certiorari has followed.

(ii)

The facts of this instant case are adquately set forth in the Supreme Court of Georgia's opinion rendered on direct appeal, which opinion is attached hereto as Respondent's Appendix A. For the Court's convenience however, a synopsis of the facts will be set forth below.

Petitioner, along with Roger Horne, escaped from the Youth Development Center in Milledgeville, Georgia, at approximately 1:30 a.m. on the morning of May 27, 1977. The two tied their clothes in two bundles and threw them out of the window of the building in which they were confined. Later they exited the building through an upper story window by climbing down sheets which had been tied together to form a rope. Horne, who

like Petitioner was dressed only in his undershorts, climbed down first. Petitioner followed Horne down the rope approximately ten seconds later. A security guard who was alerted by the noise observed Horne escaping, and gave chase. The guard stated that Horne was carrying a bundle of some sort. Unsuccessful in his attempt to quickly overtake Horne, the guard discontinued the chase and, as he turned around, saw Petitioner jump or fall to the ground and run off. The guard stated that Horne and Petitioner disappeared into the bushes at points approximately fifty feet apart.

On May 27, 1977, at approximately 12:30 p.m. a neighbor heard a scream from the victim's house and saw a boy get into the victim's car and drive off. The members of the victim's family, who resided elsewhere, were contacted by the neighbor. The victim's family arrived in approximately fifteen minutes, entered the house, and found the victim on the living room floor bleeding profusely. The victim had been severely beaten about the head and died approximately twelve hours later without regaining consciousness. A blood-splattered crowbar and a wooden stick were found hidden under the sofa.

Petitioner was subsequently apprehended in Tampa, Florida on June 1, 1977, still in possession of and driving the victim's automobile. Petitioner testified that after the escape from the Youth Development Center he and Horne came upon the victim's house at about dawn. They hid in the woods until approximately 8:00 a. m. when they observed the victim drive off in his automobile. Petitioner and Horne then allegedly entered the house, took some clothing, drank some milk and divided thirty dollars which they found in a bureau and kitchen drawers. Petitioner trimmed his hair. Petitioner further stated that afterwards he fell asleep

beneath a bed and was awakened when he heard a car turn into the driveway. Petitioner further testified that he then heard the door to the house open, and then a loud crack. Petitioner then allegedly ran into the living room where he observed the victim "on all fours" with a crowbar in his hand with Horne straddling him and beating him with a wooden stick. Petitioner testified there was a "good bit of blood" on the floor.

After coming upon the site described above, Petitioner stated that he became excited and wanted only to get out of the house. As Petitioner was leaving he saw the victim's car keys on the floor. He stopped to pick them up at which time either the victim or Horne bumped the front of his sneakers. Though excited, the Petitioner still had the wherewithal to take a jug of water with him before leaving the house and fleeing in the victim's automobile. Petitioner's fingerprints were also found throughout the victim's house.

Horne testified at trial that after he escaped from the Youth Development Center he did not see the Petitioner again. He thought the Petitioner had been captured by the security guard who had earlier chased him. Horne stated that he abandoned Petitioner's clothes in the woods, put on his own state issued pants and shirt, and kept his personal clothes. Horne stated that he stayed in the woods on the night of the escape, and on the following day walked down some railroad tracks where he changed into his personal clothes and hitchhiked to Savannah where he was apprehended a week and one-half later. Horne's fingerprints were not found in the victim's home. Further, hair samples found at the victim's home were not Horne's.

Contrary to Petitioner's contentions of innocence throughout his trial, at the June 10, 1980 state habeas evidentiary hearing Petitioner took the witness stand and confessed to the brutal murder of the victim, Mr. Hill. (T. 143-145). Petitioner not only confessed to killing Mr. Hill, but Petitioner also testified that after rendering Mr. Hill unconscious, and while the victim was in no condition to impede Petitioner's escape, Petitioner took the crowbar, stood over the victim, and swinging the crowbar like a baseball bat repeatedly beat the victim in the head. (T. 172-173).

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

A. PETITIONER'S CONTENTION THAT HIS SENTENCE OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT SOLELY BECAUSE PETITIONER WAS SEVENTEEN YEARS OLD AT THE TIME OF THE OFFENSE PRESENTS NOTHING FOR REVIEW BY THIS COURT AS NEITHER THIS ALLEGATION NOR ANY EVIDENCE IN SUPPORT OF THE SAME WERE SQUARELY PRESENTED TO THE STATE HABEAS COURT FOR CONSIDERATION. (Contention No. 1).

On his contention number one Petitioner, for the first time on this petition for a writ of certiorari, specifically contends that his sentence of death constitutes cruel and unusual punishment under the Eighth Amendment solely because Petitioner was seventeen years old at the time of the murder he committed. Because neither this allegation, nor any evidence in support of the same has ever been squarely presented to the state courts for resolution, this allegation cannot serve as the basis for the granting of the requested writ of certiorari. Cardinale v. Louisiana, 394 U.S. 437 (1969).

Notwithstanding the fact that this untimely allegation cannot serve as the basis for the granting of the requested writ, Respondent notes with interest Petitioner's characterization of himself as a child, and of his death sentence as a pending child execution. Contrary to Petitioner's assertions, however, under Georgia law Petitioner was not a child nor a juvenile, but rather an adult at the time of the murder of the victim, Mr. Hill. Ga. Code Ann. § 24A-401(c).

Further, while Petitioner contends that this Court should grant the requested writ in order that this untimely issue might be considered in conjunction with Eddings v. Oklahoma, Case No. 80-5727, Respondent notes that the defendant in Eddings, supra, was a sixteen year old juvenile at the time of the vicious murder he committed, not an adult as was Petitioner. Further, as noted by the court in Eddings v. Oklahoma, 616 P.2d 1159 (Okla. Crim. 1980), citing Gregg v. Georgia, 428 U.S. 153 (1976), capital punishment is not abhorred by public sentiment, which fact is evidenced by the enactment by state legislatures of new capital sentencing statutory schemes. Thus, the imposition of the death sentence upon this Petitioner, who was an adult at the time of the murder he committed, does not constitute cruel and unusual punishment.

B. CONTRARY TO PETITIONER'S CONTENTIONS, PETITIONER'S JURY WAS NOT INSTRUCTED TO DISREGARD PETITIONER'S YOUTH AS A POSSIBLE MITIGATING FACTOR. (Contention No. 2).

Here on this petition Petitioner contends that on voir dire the district attorney elicited a promise from all prospective jurors not to consider Petitioner's age in imposing the death penalty. However, an examination of the transcript of the voir dire readily reveals that Petitioner's characterization of the facts is not accurate. The voir dire reveals that the district attorney merely asked prospective jurors if they would automatically vote against conviction or the death penalty without regard to the evidence produced by the state solely because of Petitioner's age. The question was proper in

order to ascertain jurors who would properly try the case upon the evidence presented, giving proper weight to the Petitioner's age as a mitigating factor, and who were not predisposed to vote either for or against conviction or punishment based solely upon Petitioner's age. Petitioner's continued characterization of the subject question as the solicitation of a promise by a prospective juror not to consider Petitioner's age as a possible mitigating factor during the sentencing phase of trial is totally unfounded and a misrepresentation of the facts. Further, while Petitioner insists upon contending that the district attorney's question posed to the veniremen conveyed to the jury the impression that youth was not to be considered as a possible factor in mitigation, Petitioner has completely failed to present any objective evidence in support of this subjective deduction on his part. Petitioner has also completely failed to consider the trial court's charge to the jury on the sentencing phase of trial, which charge informed the jury that they were authorized to consider as mitigating anything they found to be mitigating without limitation or definition.

Further, Respondent finds of particular interest the fact that while Petitioner has focused his attention upon the district attorney's questions on voir dire, Petitioner has totally disregarded the fact that at trial his defense counsel strenously argued Petitioner's age as a mitigating factor on the sentencing phase of trial. Thus, because a review of the record in this case readily reveals that this contention is an inaccurate representation of the facts, the same is totally without merit.

C. CONTRARY TO PETITIONER'S CONTENTIONS, DEFENSE COUNSEL'S TACTICAL DECISION NOT TO PRESENT WITNESSES ON THE SENTENCING PHASE OF TRIAL DID NOT RENDER COUNSEL INEFFECTIVE. (Contention No. 3).

Here on this petition for a writ of certiorari Petitioner contends that his defense counsel's representation at trial was rendered ineffective due to counsel's tactical decision not to present witnesses on the sentencing phase of trial.

In Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978), the court identified the standard for constitutionally effective assistance of counsel as being:

> "Not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Id., at 1149.

In Gaines, supra, the court further stated that:

> "Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel." Id., at 1149-1150.

Though on a petition for a writ of habeas corpus the burden rests upon the applicant to make out his case, at the state habeas evidentiary hearing in this instant matter Petitioner produced the testimony of Mr. Joe Olin Mangum, who only assisted

Petitioner's lead defense counsel Mr. Lee Dickens. It is noteworthy that Petitioner, who asserts that Mr. Dickens' representation was ineffective, chose not to subpoena Mr. Dickens as a witness at his evidentiary hearing, but rather chose to present the obviously favorable testimony of a much younger junior associate who only assisted the more mature lead counsel. Notwithstanding his obvious sympathy for the Petitioner, Mr. Mangum testified that Mr. Dickens, lead counsel, had practiced criminal law in excess of twenty years. (Habeas Tx. 83). Mr. Mangum testified that he assisted Mr. Dickens in the preparation of charges to the jury, in talking to potential witnesses and the preparation of memorandums concerning those conversations, and in legal research on various matters that came up during trial. (Habeas Tx. 86-87). Mr. Mangum also testified that he was only in attendance at the trial on its last day. (Habeas Tx. 87).

Mr. Mangum also testified that he interviewed the Petitioner on several occasions, and as the result of their conversations, he acquired the names of numerous individuals which he contacted as potential character witnesses. Two of the witnesses interviewed were present at trial for possible use on the sentencing phase. These witnesses were Ms. Estelle Anderson, and Mr. Leon Ricks. (Habeas Tx. 92).

Mr. Mangum also testified that Mr. Dickens had been appointed to represent the Petitioner some five months prior to trial, and that within approximately three days of his appointment Mr. Dickens began filing pretrial motions on behalf of the Petitioner. (Habeas Tx. 104). In addition to the individuals whose names were given him by the Petitioner, the record further reflects that Mr. Dickens was in contact with Petitioner's social worker in Massachusetts, and that Mr. Dickens was aware of Petitioner's prior unsavory contacts with the criminal justice system. Regarding specifically the decision not to present

witnesses on the sentencing phase of trial, Mr. Mangum very reluctantly testified that the decision not to call these mitigating witnesses was based upon the lateness of the hour, the fact that the jury had been sequestered during a trial which spanded some three and one-half days, that the mitigation witnesses the defense had been able to acquire were not of the highest caliber, and because counsel sincerely felt that Petitioner's youth was the most persuasive factor in his favor. (Habeas Tx. 105-109).

In this instant case an examination of the transcript of Petitioner's state habeas evidentiary hearing clearly reveals that Petitioner's defense counsel, who possessed some thirty years experience in the legal practice with twenty of those years devoted to criminal law,made a tactical decision not to present to the jury that evidence available to him during the sentencing phase of trial. Further, an examination of Petitioner's own testimony revealed the existence of a long criminal history. Cognizant of Petitioner's sorted background, Petitioner testified that Mr. Dickens very carefully instructed him not to place his character into evidence when he [Petitioner] took the witness stand during the guilt/innocence phase of trial. (Habeas Tx. 161-162). Respondent contends that in light of Petitioner's unsavory background defense counsel's rationale for not placing Petitioner on the witness stand and subjecting him to a thorough and sifting cross-examination by the district attorney on the sentencing phase of trial is readily apparent. As correctly concluded by the state habeas court, Petitioner's trial counsel's decision not to present witnesses on the sentencing phase of trial was clearly a tactical one based on counsel's evaluation of the strength and weaknesses of the witnesses available. Accordingly, Petitioner's allegation that he was rendered the ineffective assistance of counsel is without merit.

D. CONTRARY TO PETITIONER'S CONTENTIONS GA. CODE ANN. § 27-2534.1(b)7 IS NOT UNCONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS INSTANT CASE. (Contention No. 4).

On this petition for a writ of certiorari Petitioner contends that Ga. Code Ann. § 27-2534.1(b)7 is unconstitutional as applied to the facts in this instant case. Contrary to Petitioner's contentions however, the state habeas court properly found this allegation to be without merit.

With reference to this challenge, the Respondent notes that the subject Code Section, in pertinent part, provides as follows:

> "The offense of murder, . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." See Blake v. State, 239 Ga. 292, 299, 236 S. E. 2d 637 (1977).

In Blake, supra, the Supreme Court of Georgia stated that it found no significant dissimilarity between outrageously vile, wantonly vile, horrible or inhuman. The Court further stated that the torture or aggravated battery to the victim constituted nothing more than the objective manifestation of the subjective depravity of mind of the defendant.

> "Considering torture and aggravated battery on the one hand as substantially similar treatment of the victim and depravity of mind on the other hand as relating to the defendant,

we find no room for nonunanimous verdicts for the reason that there is no prohibition upon measuring cause on the one hand by effect on the other hand. That is to say, the depravity of mind contemplated by the statute is that which results in torture or aggravated battery to the victim." Blake, supra at 643.

Accord, Godfrey v. Georgia, 446 U. S. 420 (1980), wherein this Court stated that:

"The Harris and Blake opinions suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § (b)7 aggravating circumstances. The first was that the evidence that the offense was 'outrageously or wantonly vile, horrible or inhuman' had to demonstrate torture, depravity of mind, or an aggravated battery to the victim. The second was that the phrase, 'depravity of mind,' comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing the victim. The third, derived from Blake alone, was that the word, 'torture,' must be construed in para materia with aggravated battery so as to require evidence of serious physical abuse of the victim before death." Id., at 408.

In Hance v. State, 245 Ga. 856, ___S.E.2d ___ (1980), the Supreme Court of Georgia, upon addressing itself to the § (b)7 aggravating circumstance stated that:

> "Torture occurs when the victim is subjected to serious physical abuse before death. Godfrey v. Georgia, Slip Op., p. 10. Serious sexual abuse may be found to constitute serious physical abuse. House v. State, 232 Ga. 140 (205 S.E.2d 217 (1974))." Hance, supra, at 861.

In light of the foregoing analysis, it is readily apparent that the finding of the § (b)7 aggravating circumstance by Petitioner's jury is amply supported by the record. In this instant case the evidence revealed that prior to his death the victim was subjected to serious physical abuse by the Petitioner in that the evidence revealed that after the victim was rendered incapable of impeding the Petitioner's escape, the Petitioner returned to the victim and continuously beat him about the head with a crowbar inflicting numerous ghastly wounds.

Thus, contary to Petitioner's contentions the evidence produced at trial amply supports the jury's finding of the § (b)7 aggravating circumstance. Petitioner's contentions to the contrary here on this petition for a writ of certiorari are without merit.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that no substantial federal question not previously decided by this Court is presented, and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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In the Supreme Court of Georgia Decided: MAY 31 1979

34444. LEGARE v. THE STATE.

UNDERCOFLER, Presiding Justice.

The appellant, Andrew Phillip Legare, was tried and convicted on charges of armed robbery, burglary, and malice murder, and sentenced to life for armed robbery, twenty years for burglary, and death for murder. He comes to this court on direct appeal and for mandatory review of the death sentence imposed.

I. Summary of the Evidence.

Essentially the evidence was as follows:

Appellant, age 17 years, and Roger Horne, age 18 years, escaped from the Youth Development Center in Milledgeville, Georgia, about 1:30 a.m. on May 27, 1977. They tied their clothes in two bundles and threw them out the window of the building in which they were confined. Later they exited the building from an upper story window by climbing down sheets which had been tied

together to form a rope. Both were dressed only in undershorts. Horne climbed down first. Appellant climbed down about ten seconds later. A security guard was alerted by a noise, observed Horne escaping, and gave chase. He stated Horne was carrying some sort of bundle. The guard discontinued the chase and as he turned around appellant had jumped or fallen to the ground and was running off. He stated Horne and appellant disappeared into the bushes about fifty feet apart.

On May 27, 1977, about 12:30 p.m., a neighbor heard a scream from the victim's house and saw a boy get into the victim's car and drive off. He called members of the family who resided elsewhere. They arrived in about fifteen minutes, entered the house, and found the victim on the living room floor bleeding profusely. He had been beaten severely about the head and died about twelve hours later without regaining consciousness. A blood spattered crowbar and a wooden stick were found under the sofa.

Appellant was apprehended in Tampa, Florida, on June 1, 1977, while driving the victim's car. He testified that after the escape he and Horne came upon the victim's house about dawn. They hid in the woods until about 8:00 a.m. when they observed the victim drive off in his car. Then they entered the house, took some

clothes, drank some milk, and divided $30.00 which they found in a bureau drawer and kitchen drawer. Appellant trimmed his hair. Appellant stated he had gone to sleep beneath a bed when he heard a car come into the driveway, the door open, and a loud "crack." He went into the living room and observed the victim "on all fours" with a crowbar in his hand with Horne straddling him and beating him with a wooden stick. There was a "good bit of blood" on the floor. Appellant stated he became excited and wanted to get out of there. As he left he saw the victim's car keys on the floor. He picked them up and the victim or Horne bumped the front of his sneaker, he also picked up a jug of water, ran out, and fled in the victim's car. His fingerprints were found in the victim's house. Appellant admitted blood stained sneakers found in the car were his.

Horne testified that after he escaped from the Youth Development Center he did not see appellant again. He thought appellant had been captured by the security guard who chased him. He stated he abandoned appellant's clothes in the woods, put on his State pants and shirt, and kept his personal clothes; that he stayed in the woods that night; the next day he walked down some railroad tracks, changed into his personal clothes, and hitchhiked

to Savannah where he was apprehended a week and a half later. His fingerprints were not found at the victim's house. Hair samples found at the victim's house were not Horne's. Horne led police officers to the locations where he discarded certain clothing and a location where he had smoked cigarettes. Police recovered the clothing and evidence of smoking.

II. Enumerations of Error.

1. In Enumeration 1, the appellant alleges: "The court below erred in its charge to the jury on sentencing in that said charge, considered as a whole, did not make it clear that the jury could recommend mercy, i.e., a life sentence, even if the jury found that the existence of statutory aggravating circumstances had been proven."

We have examined the sentence charge and conclude that it made clear to the jury that it could recommend mercy, i.e., a life sentence even if the jury found that the existence of statutory aggravating circumstances had been proved. Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1977); Hawes v. State, 240 Ga. 327 (240 SE2d 833) (1977); Spivey v. State, 241 Ga. 477 (246 SE2d 288) (1978).

Enumeration 1 is without merit.

2. In Enumeration 2, the appellant alleges, "The court below erred in its charge to the jury on sentencing because the charge was confusing, self-contradictory, and did not include a proper charge on non-statutory mitigating circumstances."

In addition to reading from the statute, the trial court charged the jury, "[n]ow, in arriving at the determination for the punishment for murder you are authorized to consider all the evidence received in court, presented by both the State and the defendant throughout the trial before you. You are authorized to consider the facts and circumstances, if any, in extenuation, mitigation, or aggravation of punishment which may have been submitted to you." The trial court also charged "there was no evidence of either aggravation on behalf of the State or mitigation on behalf of the defendant that has been admitted into evidence, except the argument of both, the State, and the defendant." This latter charge obviously referred to the sentencing phase of the trial. We have held that it is not required that the trial court single out mitigating circumstances for consideration of the jury. Thomas v. State, 240 Ga. 393 (242 SE2d 1) (1978); Potts v. State, 241 Ga. 67 (243 SE2d 570) (1978); Spivey v. State, supra.

Enumeration 2 is without merit.

3. In Enumeration 3, the appellant alleges: "The court below erred in its charge to the jury on sentencing by charging repealed Georgia Code Ann. § 27-2534 and failing to charge the substance of Georgia Code Ann. § 27-2503 (b)."

The appellant contends the trial court committed reversible error by not instructing the jury as follows: "Upon the conclusion of the evidence and the arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating and aggravating circumstances as defined in § 27-2534.1, exist and whether to recommend mercy for the defendant."

The trial court charged the jury that it was their duty "to consider any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence" and that "in arriving at the determination for the punishment for murder you are authorized to consider all the evidence received in court, presented by both the State and the defendant throughout the trial before you. You are authorized to consider the facts and circumstances, if any, in extenuation, mitigation, or aggravation of punishment which may have been

submitted to you," as well as clearly informing the jury that if they found the defendant guilty of count number one (murder) and statutory aggravating circumstance or circumstances were found by the jury they could recommend mercy or that the defendant's punishment be life imprisonment.

When viewed in the context of the overall charge, Spivey v. State, supra, the trial court's charge fully and properly informed the jury that they were authorized to determine the existence of any mitigating or aggravating circumstances, and that they too were authorized to make a recommendation of mercy for the defendant, in reaching their decision on the issue of punishment. This accords with this court's decisions in Fleming, Hawes, and Spivey, supra.

Enumeration 3 is without merit.

4. In Enumeration 4, the appellant alleges: "The trial court erred in submitting to the jury two statutory aggravating circumstances."

The trial court charged the jury on three statutory aggravating circumstances. The appellant's objection is directed to the following two: "1. That the offense of murder was committed while the offender was engaged in the commission of another

capital offense, to wit, armed robbery. 2. That the offense of murder was committed while the offender was engaged in the commission of burglary."

Appellant contends that the crimes of armed robbery and burglary are lesser included offenses of the crime of murder under the facts of this case and these crimes merged into the conviction for murder; that they were "figuratively exhausted," and could not serve as statutory aggravating circumstances to predicate a recommendation of death as punishment.

In Stanley v. State, 240 Ga. 341 (241 SE2d 173) (1977) this court held that a second crime, such as armed robbery, may be used as an aggravating circumstance for imposition of the death penalty, and that a lesser included offense may constitute an aggravating circumstance, even though it may not be punished separately. See Pryor v. State, 238 Ga. 698 (234 SE2d 918) (1977). This case does not involve mutually supporting aggravating circumstances and the case of Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974) is not applicable.

Enumeration 4 is without merit.

5. In Enumeration 5, the appellant alleges: "The court below erred in refusing appellant's requested charge for a special verdict."

The appellant contends that the jury did not specify in its verdict whether they found appellant guilty of malice murder, or murder on a conspiracy theory, and there exists the possibility that appellant was found guilty on a conspiracy theory, and, if so, his resulting death sentence is disproportionate to the crime committed. We disagree. Appellant was found guilty of malice murder. He is equally guilty whether he did the actual killing or the killing was the probable consequences of the conspiracy. Whether the sentence of death is disproportionate to the crime is addressed hereafter in division III "Sentence Review." Enumeration 5 is without merit.

6. In Enumeration 6, the appellant alleges: "The court below erred in overruling appellant's motion to declare the death penalty unconstitutional and in imposing that penalty on appellant."

This court and the Supreme Court of the United States have upheld the constitutionality of the Georgia death penalty statute in a number of cases and the appellant has advanced no new reason for us to reconsider our position. Coley v. State, 231 Ga. 829 (204 SE2d 612) (1974); Young v. State, 237 Ga. 852, 856 (230 SE2d 287) (1976); Moore v. State, 240 Ga. 870, 813 (243 SE2d 1) (1978); Gregg v. Georgia, 428 U. S. 153 (96 SC 2909, 49 LE2d 859) (1976).

Enumeration 6 is without merit.

7. In Enumeration 7 the appellant alleges: "Under the facts of this case and the charge of the trial court to the jury, armed robbery and burglary were lesser included offenses of murder, and the convictions for same must be set aside."

We do not agree. The jury found the appellant guilty of malice murder, armed robbery, and burglary. It found the murder was committed while the appellant was engaged in the commission of armed robbery and burglary. It found also that the murder was outrageous, wanton, horrible, or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. It assessed the death penalty for the murder. The findings and verdicts are supported by the evidence. "Verdicts are to have a reasonable intendment and are to receive a reasonable construction, and are not to be avoided unless from necessity." Code Ann. § 27-2301. In our opinion the verdicts of guilty, the aggravating circumstances which were found, and the imposition of the death penalty show clearly the jury determined that the appellant was a party to the crime of murder. Accordingly, the crimes of burglary and armed robbery are not included offenses. See Potts v. State, 241 Ga. 67, 77 (11) (243 SE2d 510) (1978). Enumeration 7 is without merit.

8. In Enumeration 8 the appellant alleges: "The court below erred in overruling appellant's motion for a continuance on the basis of the State's last minute amendment to the list of witnesses."

After the voir dire of witnesses had been completed, the prosecution, having discovered that Dr. Smithson, whose name had been provided on the list of witnesses would not appear, presented the name of nurse Barbara Schipani as a substitute witness. Counsel for appellant made a motion that nurse Schipani not be allowed to testify, or that the defense be granted a continuance in order to investigate the witness' proposed testimony.

The court ruled that the witness would be allowed to testify but that appellant's counsel would be given an opportunity to interrogate the witness prior to her testimony. There is no indication that the appellant moved for a mistrial and the record is silent on whether counsel did in fact interrogate her before she testified.

Code Ann. § 27-1403 provides in part: "Without the consent of the defendant, no witness shall be permitted to testify for the State whose name does not appear upon the list of witnesses as furnished to the defendant unless the solicitor or prosecuting

attorney shall state in his place that the evidence sought to be presented is newly-discovered evidence which the State was not aware of at the time of its furnishing the defendant with a list of the witnesses."

The appellant's objection being made in the alternative and having been granted the opportunity to interrogate the witness before she testified, we cannot say the trial court erred. Brown v. State, 235 Ga. 644, 646 (220 SE2d 922) (1975); Yeomans v. State, 229 Ga. 488 (1) (192 SE2d 362) (1972).

Enumeration 8 is without merit.

9. In Enumeration 9, the appellant alleges: "The court below erred in excluding veniremen conscientiously opposed to the death penalty."

Appellant does not contest that the veniremen excused made it unmistakably clear that they would vote against imposition of the death penalty in any and all circumstances. Rather the thrust of his argument is that excuse of such persons without coincidental exclusions of all veniremen who might be prejudiced in favor of guilt or of capital punishment denies appellant's rights to an impartial jury and fair trial under Sixth Amendment as applicable to the states by incorporation through the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

This contention has been rejected in earlier cases by this court and the Supreme Court of the United States. Smith v. Hopper, 240 Ga. 93 (239 SE2d 510) (1977); Porter v. State, 237 Ga. 580 (229 SE2d 384) (1978). Enumeration 9 is without merit.

10. In Enumeration 10 the appellant alleges: "The court below erred in allowing the State to ask certain questions concerning capital punishment to all veniremen as a group after several veniremen had been individually polled and qualified."

The appellant cites the general guidelines provided in Code Ann. §§ 59-705 and 59-809 in support of his position.

In Whitlock v. State, 230 Ga. 700 (195 SE2d 865) (1973), this court said, "The single purpose for voir dire is the ascertainment of the impartiality of jurors, their ability to treat the cause on the merits with objectivity and freedom from bias and prior inclination. The control of the pursuit of such determination is within the sound legal discretion of the trial court, and only in the event of manifest abuse will it be upset upon review." Where, as here, there was an indication that the general questions had not been heard we find no abuse by the trial court in permitting questioning on matters contained in the general questions even though some veniremen had been questioned individually. Welch

v. State, 237 Ga. 665 (229 SE2d 390) (1976); Gatlin v. State, 236 Ga. 707 (225 SE2d 224) (1976). Enumeration 10 is without merit.

11. In Enumeration 11 the appellant alleges: "The court below erred in allowing the jury to disperse without consent of counsel for defendant after having been sworn in as jurors," and in Enumeration 12 he alleges, "The court below erred in failing to grant a new trial after appellant showed that jurors had been allowed to disperse, that some jurors had unsupervised contacts with persons other than bailiffs and that other jurors while unsupervised had opportunities for impermissible contacts."

Code Ann. § 59-718.1 provides: "At any time during the trial of a civil or criminal case, whether before or during jury deliberation, the judge may, in his discretion, allow the jury to be separated and the members thereof dispersed under appropriate instructions, except in capital cases."

It is clear from the record that the appellant did not consent to any dispersal. The dispersal was for the purpose of securing personal items necessary for the jurors to use while being sequestered during the trial.

Violation of the quoted code section or the possibility of an unauthorized contact or communication involving a juror, would not automatically demand that appellant be granted a new trial.

In Whitlock v. State, supra at pp. 701-702, this court stated: "Whenever the union and isolation of the jury have been broken, there arises a legal presumption that the defendant has been injured, and 'it [is] incumbent upon the State to have rebutted that legal presumption, not only by evidence that the juror did not speak to anyone himself, nor did anyone speak to him about the case, but that he did not hear anyone . . . express any opinion in relation to the case,'" (citing Daniel v. State, 56 Ga. 653, 655 (1976)).

The bailiffs testified at a post-trial hearing that they did not allow and were not aware of any authorized contact or communications involving the jurors who composed appellant's jury and every member of appellant's jury testified under oath that they never disobeyed the court's instructions that they not discuss appellant's case, allow anyone to discuss it in their presence, nor did they hear anyone express any opinion in regards to appellant's case.

The State carried the burden of rebutting any presumption of harm or prejudice to the defendant.

Enumerations 11 and 12 are without merit.

12. In Enumeration 13 the appellant alleges: "During the trial, jurors were allowed to view appellant in handcuffs outside the courtroom. The court below erred in overruling a motion for new trial made on this ground."

It appears to be uncontested that two or three jurors inadvertently noticed the appellant entering the sheriff's automobile while handcuffed, during a recess at some point during the trial. The jurors testified during the hearing on the appellant's motion for a new trial that they were not prejudiced against appellant, that their deliberations in the case were not affected in any way by what they saw.

There was no exhibiting of the accused in chains to the court and the incident does not appear to have been of such significance as to be noted during the course of the trial. Under these circumstances, the cases cited by the appellant in support of his contention, Estelle v. Williams, 425 U. S. 501 (96 SC 1691, 48 LE2d 126), Reh. denied, 426 U. S. 954 (96 SC 3182, 49 LE2d 1194) (1976), and McKenzey v. State, 138 Ga. App. 88 (225 SE2d 512) (1976) have no application. Enumeration 13 is without merit.

13. In Enumeration 14, the appellant alleges: "The court below erred in sustaining an objection by the State to certain questions asked of Milledgeville Police Officer Ralph Starley."

State's witness Ralph Starley, a police officer, testified on direct examination that upon arrival at the victim's residence, he and other officers proceeded cautiously around the house before breaking in to help Mr. Hill because they believed a burglar might still be in the house. He stated on cross-examination that Marvin Jones, a neighbor, had seen "subjects" entering the premises. Counsel for appellant attempted to ask further questions regarding this statement of Marvin Jones in order to discover the reason behind the witness's belief that one of the subjects might still be in the house. The court sustained the objection on the ground that the statement of Marvin Jones would be hearsay.

This court has consistently held in accord with the trial court's ruling. As early as Kelly v. State, 82 Ga. 441 (1887), this court addressed the issue of the admissibility of a conversation of a witness with a third person, where the purpose of proving the conversation is merely to show inducement, or conduct: ". . . we think it would have been more regular to admit only the fact that a conversation occurred, without going into the particulars of what was said. The fact itself was all that was needed to show inducement, and certainly the conversation was not admissible for any other purpose. Accord, McNeal v. State, 228 Ga.

633, 637 (187 SE2d 271) (1972); Lingo v. State, 226 Ga. 496, 498 (175 SE2d 657) (1970).

Marvin Jones appeared and testified at appellant's trial but the appellant did not question him on this point.

Enumeration 14 is without merit.

14. In Enumeration 15 the appellant alleges: "The court below erred in refusing appellant's motion at trial for discovery of written statements of Marvin Jones, a key witness of the prosecution."

At no point in the trial does it appear that there was indeed a written statement of Marvin Jones. At most it appears that a police summary may have made some reference to Jones' statements to the police. At issue appears to be the question of whether Jones told the police that there were "suspects" rather than "a suspect" in the house where the crime occurred and whether he said he saw a person leave the house before the appellant left.

In Dickey v. State, 240 Ga. 634 (242 SE2d 55) (1978) this court said: "A defendant assigning error upon the denial of a 'Brady motion' must do more than show suppression. Moore v. Illinois, 408 U. S. 786, 795-798 (92 SC 2562, 33 LE2d 706) (1972); Hicks v. State, 232 Ga. 393, 396 (207 SE2d 30) (1974); Pryor v.

State, 238 Ga. 698, 706 (234 SE2d 918) (1977). See United States v. Harris, 458 F2d 670, 677 (5th Cir., 1972); United States v. Crow Dog, 532 F2d 1182, 1189 (8th Cir., 1976). A defendant assigning error upon the denial of a 'Brady motion' and suppression of an inconsistent statement by a key prosecution witness must show that '. . . the suppressed evidence might have affected the outcome of the trial.' United States v. Agurs, 427 U. S. 97 (96 SC 2392, 49 LE2d 342) (1976)."

The Agurs case established "[i]f there is no reasonable doubt about guilt, whether or not the additional evidence is considered, there is no justification for a new trial."

In the instant case the evidence is overwhelming that the appellant was in the victim's house and in possession of the victim's property. Under these circumstances we find no justification for a new trial on this issue. Enumeration 15 is without merit.

15. In Enumeration 16, the appellant alleges: "The trial court erred in requiring the District Attorney to make a statement to the jury revealing any alleged agreement with State's witness Roger Loring Horne, and thereafter allowing the District Attorney to make a prejudicial statement to the jury concerning his inability to find evidence linking Horne to the crimes of which appellant was accused rather than making the required statement."

We note at the outset that the appellant made no objection at trial to the statement by the district attorney. In fact, although the district attorney and counsel for Horne both asserted no promise had been made to Horne, the appellant's counsel insisted that the statement by the district attorney clearly showed the existence of an agreement made in exchange for Horne's testimony with the following argument:

"Mr. Dickens: Your Honor, of course, what has been said here clearly indicates this. That the district attorney has, in effect, indicated to Horne through his attorney that if all goes well in this trial from the State's standpoint, he won't be tried. His case will be nol prossed. If that isn't a promise, if that isn't an inducement, there has never been an inducement made in the whole country."

Under these circumstances it was proper for the district attorney to repeat the statement. Not only will the failure to interpose a timely objection at trial preclude consideration of an objection raised for the first time on appeal, Clenny v. State, 229 Ga. 561, 563 (192 SE2d 907) (1972), but "A defendant will not be allowed to induce an asserted error, sit silently by hoping for an acquittal, and obtain a new trial when that tactic fails."

Hill v. State, 237 Ga. 523 (228 SE2d 909) (1976); Edwards v. State 235 Ga. 603, 604 (221 SE2d 28) (1975).

Enumeration 16 is without merit.

16. In Enumeration 17 the appellant alleges: "The court erred in sustaining the State's objection to appellant's attempt to impeach co-indictee Roger Horne, through the use of statements made in connection with a polygraph examination," and in Enumeration 18, that "The court below erred in sustaining the State's objection to appellant's questions to co-indictee Roger Horne which tended to show Horne's unreliability by virtue of the results of a polygraph examination."

In State v. Chambers, 240 Ga. 76 (239 SE2d 324) (1977) this court held on express stipulation by the parties, the results of a polygraph examination may be admitted into evidence. There was no stipulation of the parties in this case and the appellant abandoned the issue when left open by the trial court saying, "Your Honor, insofar as the defendant is concerned, we are not pursuing that subject."

Enumerations 17 and 18 are without merit.

17. In Enumeration 19 the appellant alleges: "The court below erred in instructing the jury on the admissibility of evidence concerning serological tests."

The State failed to connect up with a complete chain of custody blood samples taken from the victim, the appellant and Roger Horne. There was also testimony that blood was of human origin and the type of the same on the clothing, shoes, stick, crowbar, and any other specific objects delivered to the Crime Lab, either found in the home of George W. Hill, Sr., or in the custody of the defendant and submitted to the State Crime Lab for examination. The court ruled out and instructed the jury to disregard the tests where the State had failed to connect up with a chain of custody and permitted consideration of the tests on the clothing, shoes, stick, crowbar, and other specific objects delivered to the Crime Lab, either found in the home of George W. Hill, Sr., or in the custody of the defendant and submitted to the State Crime Lab for examination.

It was material and relevant in each instance that the blood was human blood. Although the types may have been of no significance, it was important that they were typable as human blood and that they did or did not come from the same person.

The cautionary charge of the court, repeated in the final charge was proper. Additionally, the appellant has not demonstrated any harm or prejudice to himself. Chenault v. State, 234 Ga. 216, 220 (215 SE2d 223) (1975).

Enumeration 19 is without merit.

18. In Enumeration 20, the appellant alleges: "The trial court improperly denied appellant a twenty-four hour continuance in order to investigate the possibility of another cause of death of the victim."

The request for a continuance was withdrawn by appellant's counsel at trial and this enumeration is without merit.

19. In Enumeration 21, the appellant alleges: "The court below erred in denying appellant's motion for a directed verdict made on the ground that the State failed to prove that appellant caused the death of George Hill, the alleged victim named in the indictment."

The evidence was sufficient to support a verdict, and it was not error for the trial court to refuse to direct a verdict of acquittal. Stamper v. State, 235 Ga. 165, 170 (219 SE2d 140) (1975); Cunningham v. State, 235 Ga. 126 (218 SE2d 854) (1975).

20. In Enumeration 22, the appellant alleges: "The court below erred in sustaining the State's objection to the introduction of a full transcript of appellant's statement to police, parts of the statement having been previously used by the prosecution for the purpose of impeachment."

The trial court ruled, "And for the purposes of the record, I would like to state that the court is not preventing you from going into the exact detail with this defendant as to what statement, if any, he made in Tampa. I'm simply stating that I am not admitting the instrument into evidence."

Appellant argues in his brief, "It is well settled '. . . that where an effort is made to impeach a witness by proving contradictory statements made in a conversation which occurred previously to the trial, it is competent to sustain the witness by bringing out the whole of that conversation, in order that the true drift and meaning of what was then said by him may be correctly understood.' Lowe v. State, 97 Ga. 792, 794 (125 SE2d 676) (1895); Smalls v. State, 105 Ga. 669 (31 SE 571) (1898); Parrish v. State, 88 Ga. App. 881, 78 SE 366) (1953). In Parrish, supra at p. 882, the Court of Appeals, reviewing the admissibility of a statement made by the defendant at the time of his arrest, states: 'If it was not the entire conversation which took place, or did not embody the entire substance of the previous oral declarations, the State was not required to show verbatim all that transpired, but the defendant was at liberty to do so if he desired.'"

It is clear that the trial court was permitting a verbatim showing by instructing appellant's counsel that "the court is not

preventing you from going into the exact detail with this defendant as to what statement if any, he made in Tampa."

Enumeration 22 is without merit.

21. In Enumeration 23, the appellant alleges: "The trial court erred in denying appellant's motion for a new trial."

In support of this enumeration the appellant asserts the general grounds and urges in support thereof the prior enumerations and the arguments made.

We do not find that the trial court erred in any manner enumerated and did not err in denying appellant's motion for a new trial on the general grounds.

Appellant's other enumerations alleging that the death penalty was imposed under influence of passion, prejudice and other arbitrary factors and the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant are matters that will be considered in our review of the death sentence.

III. Sentence Review.

Our sentence review has included consideration of the aggravating circumstances found by the jury and the evidence introduced in court concerning the crime and the defendant. After a review

of the record and transcript, we conclude that the sentence of death imposed on Andrew P. Legare was not imposed under the influence of passion, prejudice or any other arbitrary factor. (Code Ann. § 27-2537 (c)(1)).

1. The offense of murder was committed while the offender was engaged in the commission of another capital offense, to wit, armed robbery. (Code Ann. § 27-2534.1 (b)(2)).

2. That the offense of murder was committed while the offender was engaged in the commission of a burglary. (Code Ann. § 27-2534.1 (b)(2)).

3. The offense of murder was outrageously and wantonly vile, horrible or inhumane in that it involved torture, depravity of mind, or an aggravated battery to the victim. (Code Ann. § 27-2534.1 (b)(7)).

We have reviewed the instructions given by the trial court on sentencing and find that they are not subject to the defects addressed in Fleming v. State, supra, and Hawes v. State, supra.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder, and we find the cases listed in the appendix support affirmance of the death penalty.

There is evidence to establish that the appellant broke into the victim's home, ransacked it, and lay in wait for the victim's return, then brutally beat him to death, took his automobile and made his get away.

Andrew Legare's sentence to death for murder is not excessive or disproportionate considering both the crime and the defendant. (Code Ann. § 27-2537 (c)(3)). The verdict is factually supported.

Judgment affirmed. All the Justices concur.

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APPENDIX

1. House v. State, 232 Ga. 140 (205 SE2d 217) (1974).
2. Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974).
3. Floyd v. State, 233 Ga. 280 (210 SE2d 810) (1974).
4. Chenault v. State, 234 Ga. 216 (215 SE2d 223) (1975).
5. Smith v. State, 236 Ga. 12 (222 SE2d 308) (1976).
6. Birt v. State, 236 Ga. 815 (225 SE2d 248) (1976).
7. Coleman v. State, 237 Ga. 84 (226 SE2d 911) (1976).
8. Isaacs v. State, 237 Ga. 105 (226 SE2d 922) (1976).
9. Dungee v. State, 237 Ga. 218 (227 SE2d 746) (1976).
10. Banks v. State, 237 Ga. 325 (227 SE2d 380) (1976).
11. Young v. State, 239 Ga. 53 (236 SE2d 1) (1977).
12. Gaddis v. State, 239 Ga. 238 (236 SE2d 594) (1977).
13. Peek v. State, 239 Ga. 422 (238 SE2d 12) (1977).
14. Bowden v. State, 239 Ga. 821 (238 SE2d 905) (1977).
15. Westbrook v. State, 242 Ga. 151 (249 SE2d 524) (1978).
16. Finney v. State, 242 Ga. 582 (SE2d) (1978).
17. Davis v. State, 242 Ga. 901 (SE2d) (1979).
18. Spraggins v. State, 243 Ga. 73 (SE2d) (1979).

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

PHILLIP ANDREW LEGARE,	:	
	:	
PETITIONER	:	
	:	CASE NO. 4557
VS.	:	
	:	HABEAS CORPUS
WALTER D. ZANT, SUPERINTENDENT GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

O R D E R

This Habeas Corpus Petition challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Baldwin County, Georgia. The Petitioner alleges that such restraint and imposition violate his rights under the Constitution of the United States and under the Constituion and laws of the State of Georgia. On November 24, 1977, Petitioner was convicted in the Superior Court of Baldwin County of Murder, Armed Robbery and Burglary. He was sentenced that day to death by electrocution for the Murder, life imprisonment for the Armed Robbery, and twenty (20) years imprisonment for the Burglary. The Supreme Court of Georgia affirmed Petitioner's convictions and death sentence. Legare v. State, 243 Ga. 744 (1979). His petition for

certiorari in the Supreme Court of the United States (No. 79-5391) was denied. Legare v. Georgia, 48 U.S.L.W. 3372 (1979).

Although this Petition asserts sixteen counts, evidence and argument were presented on only three, and the others are deemed waived.

The record in this habeas case consists of the transcript and record of Petitioner's trial and the transcript and record of this habeas proceeding.

1.

Petitioner contends that under the Standards announced in Godfrey v. Georgia, 48 U.S.L.W. 4541 (May 19, 1980), the death penalty was imposed in this case in violation of his rights under the Eighth and Fourteenth Amendments of the United States Constitution.

FINDINGS OF FACT

The jury found the Petitioner guilty of Armed Robbery and Burglary in addition to Murder. (See T.T., pps. 812-813). During the sentencing phase, the jury was charged on two statutory aggravating circumstances in addition to the trial court's charge on Ga. Code Ann. §27-2534.1(b)(7). The charge was as follows:

> "...(2) The offense of murder was committed while the offender was engaged in the commission of another capital felony, or the offense of murder was committed while the offender was engaged in the commission of burglary." (Trial Transcript, pps. 812-813).

Under this charge, the jury found that the murder had been committed while the Defendant was engaged in the commission of an Armed Robbery and Burglary. Upon the findings of these two statutory aggravating circumstances, as well as the (b)(7) circumstance, the jury sentenced the Petitioner to death by electrocution. (See Trial Transcript, p. 835).

CONCLUSIONS OF LAW

The United States Supreme Court recently held that Ga. Code Ann. §27-2534(b)(7) was unconstitutionally vague where there was no clarifying construction in either the trial court's instructions or in the sentence review by the Georgia Supreme Court. Godfrey v. Georgia, ____ U.S. ___, 48 U.S.L.W. 4541 (May 19, 1980). Godfrey involved a case where the sole aggravating circumstance was the (b)(7) element of "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." It is this statutory aggravating ground that the Supreme Court held to be unconstitutionally vague without some narrowing or clarifying instruction from either the trial court or the state Supreme Court. The Court specifically reserved judgment on the issue of whether the death penalty imposed on other statutory aggravating grounds in addition to the (b)(7) circumstance would withstand constitutional scrutiny.

In a footnote on page 12 of the slip opinion the Court states:

"The sentences of death in

this case rested exclusively on §(b)(7). Accordingly, we intimate no view as to whether or not the petitioner might constitutionally have received the same sentence on some other basis...."

Thus, the Supreme Court has reserved for a later time a decision on the issue of whether the existence of (b)(7) grounds for the imposition of the death penalty along with the simultaneous commission of another felony would pass constitutional muster. For this reason, the Petitioner's contention that his sentence was unconstitutionally imposed in light of Godfrey cannot be sustained since Petitioner was found guilty of two other aggravating circumstances: armed robbery and burglary.

Assuming, however, that the death penalty cannot stand with armed robbery and burglary as the supporting aggravating circumstances, the Court is nevertheless of the view that this case can rest on (b)(7) alone without offending the Godfrey principle. The victim in this case was severely beaten in a manner that supports a finding of torture and aggravated battery to the victim. Legare's own testimony at the habeas hearing [See H.T., pp. 144-145] confirmed what circumstantial evidence had shown at trial - that the killing was brutal and involved a maniacal kind of beating that continued long after the victim had been rendered helpless.

This contention of Petitioner is, therefore, without merit.

2.

Petitioner contends that the imposition of the death sentence violated the Petitioner's Sixth, Eighth and Fourteenth Amendment rights because the jury was prevented from considering important factors in mitigation.

FINDINGS OF FACT

The trial judge's instructions to the jury during the sentencing phase are set out at pages 819-831 of the trial transcript. All of these instructions are made a part of this Court's finding on this issue. The trial court made several references in its charge that the jury was to consider both mitigating and aggravating circumstances. At one point, the trial court charged as follows:

> "Now in arriving at the determination for the punishment for murder you are authorized to consider all the evidence received in court, presented by both the State and the Defendant throughout the trial before you. You are authorized to consider the facts and circumstances, if any, in extenuation, mitigation, or aggravation of punishment which may have been submitted to you."
> (T.T., p. 820).

An examination of the record reveals that of the 43 prospective jurors subjected to voir dire on the issue of whether the age of the Defendant

would prevent them from sentencing the Defendant to death, only one indicated that she would not be able to impose the death penalty because of the Defendant's age. (Voir Dire Transcript, pp. 26-259). She was not excused for cause.

The trial counsel for the Petitioner did not introduce any evidence on behalf of the Petitioner relating to possible mitigating circumstances at the sentencing phase of the trial. He did, however, give argument.

CONCLUSIONS OF LAW

The Court's charge during the sentencing phase of the trial, while not a model of clarity, did instruct the jury that they should consider mitigating circumstances and that they could recommend a life sentence even though an aggravating circumstance was found. (T.T. 831). The charge, therefore, comports with statutory and constitutional requirements. See Spivey v. State, 241 Ga. 477 (1978); Fleming v. State, 240 Ga. 142 (1977); Hawes v. State, 240 Ga. 327 (1977).

The Petitioner contends that the prosecutor illicited promises from the prospective jurors by questioning them as what effect the age of the Defendant would have on their decisions of guilt and sentencing. Under decisions by the Georgia Supreme Court and the United States Supreme Court, the jury must be allowed to consider mitigating circumstances. Jurek v. Texas, 428 U.S. 262, 271 (1976); Gregg v. Georgia, 428 U.S. 153, 197 (1976); Lewis v. State, _____ Ga. ____ (No. 35997, decided July 1, 1980). Age (youth) is a mitigating

circumstance. Lewis v. State, supra (slip opinion at page 5).

However, Lewis involved a situation where the veniremen who indicated that the Defendant's age would preclude them from considering the death penalty were excused for cause. The record in the case sub judice demonstrates that only one of the jurors questioned on the subject of the Defendant's age indicated she could not give the death sentence because of the Defendant's age. She was not excused for cause (see Voir Dire Transcript, p. 93). Thus, the rationale in Lewis based on Witherspoon v. Illinois, 391 U.S. 510, 522 f.n. 21 (1968) is inappropriate here.

Under the analysis above, the question by the prosecutor on the mitigating factor of age did not render the jury impaneled to try the Defendant constitutionally infirm. For this reason, this contention by the Petitioner is without merit.

Petitioner also contends that the failure of the trial counsel to present any evidence in mitigation resulted in the unconstitutional imposition of the death penalty. Petitioner asserts that the ineffectiveness of the trial counsel was one of the reasons no evidence was presented.

Under the decision of MacKenna v. Ellis, 280 F.2d. 592, 599 (5th Cir. 1960), the Fifth Circuit Court of Appeals interpreted the right to counsel to mean "not errorless counsel, and counsel judged to be ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Accord, see Hawes v. State, 240 Ga. 327,

329 (1977); Pitts v. Glass, 231 Ga. 638, 639 (1974). Under this guideline, trial counsel's failure to present evidence in mitigation at the sentencing phase cannot be said to be ineffective. In addition, the closing argument of Mr. Dickens was perhaps the best possible plea for mercy. (See Argument Transcript, pp. 79-87). The decision not to present any witnesses was clearly a tactical one based on counsel's evaluation of the strength of the witnesses available. (See Habeas Transcript, pp. 92-94).

This contention is also without merit.

3.

Petitioner contends that his Eighth and Fourteenth Amendment rights were violated in this case by the absence of meaningful prosecutorial discretion in the decision to seek the death penalty and by prosecutorial misconduct.

FINDINGS OF FACT

There have been per capita, more death sentences sought and obtained in the Ocmulgee Judicial Circuit than in other areas of Georgia.

While it was suggested that there may have been some kind of inverse racial motivation for the decision to seek the death penalty in Petitioner's case (Habeas Transcript, p. 101), the Court cannot, based on the evidence presented, make any such finding.

CONCLUSIONS OF LAW

No probative evidence was presented by the Petitioner on this contention. It is axiomatic that the burden rests on the habeas petitioner to

make out his case. Sims v. Smith, 228 Ga. 136 (1971). Further, the Supreme Court has, as a part of its sentence review, determined that this death penalty is not disproportionate to other cases. Legare v. State, 243 Ga. 744, 759 (1979).

This contention is also without merit.

CONCLUSION

WHEREFORE, no constitutional rights of the Petitioner having been violated the Petition is denied as to both the conviction and the sentence.

SO ORDERED, this 13th day of October, 1980.

R. ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT